89-1837

No. 89-

In The

Supreme Court of the United States

October Term, 1989

UNITED TRANSPORTATION UNION,

Petitioner,

v.

GRAND TRUNK WESTERN RAILROAD COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

Whether a rail carrier which has historically participated in national negotiations concerning wages and national rules may, consistent with its obligations under Section 2 First of the Railway Labor Act (45 U.S.C. § 152 First) to "make and maintain agreements," refuse to participate in national negotiations and may negotiate locally where the issues are practically appropriate for national handling.

PARTIES BELOW

The parties listed in the caption, United Transportation Union and Grand Trunk Western Railroad Company, are the only parties involved in the case.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner United Transportation Union ("UTU") respectfully requests that this Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered on February 21, 1990 in *UTU v. Grand Trunk Western Railroad Company*, 6th Cir. No. 89-1523.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is not yet officially reported, but is unofficially

reported at 133 LRRM 2845, and is reprinted in the Appendix hereto at 1a-4a. The ruling of the United States District Court for the Eastern District of Michigan, Southern Division (Zatkoff, J.) was issued on April 20, 1989, is reported at 712 F.Supp. 107 (E.D. Mich. 1988), and is reprinted in the Appendix hereto at 6a-17a. The District Court's judgment is printed in the Appendix hereto at 5a.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit entered its decision on February 21, 1990. Petitioner has not sought rehearing and is filing this petition within the time prescribed by 28 U.S.C. §2101(c). Petitioner seeks to invoke the jurisdiction of this Court under 28 U.S.C. §1254(1).

STATUTE INVOLVED

The complaint underlying this action was brought and the defenses raised arise under the Railway Labor Act [hereinafter, "RLA"], 45 U.S.C. §151, *et seq.* Relevant portions of that statute are reprinted in the Appendix hereto at 18a-19a.

STATEMENT OF CASE

Petitioner is a labor organization representing employees of Respondent Grand Trunk Western Railroad

Company [hereinafter, "GTW"] under the RLA. The underlying complaint was brought by UTU on behalf of three of its General Committees of Adjustment (subordinate units of UTU) in response to the GTW's refusal to participate in national negotiations over the parties' proposals for changes in the railroad industry's national wages and rules (although one of the General Committees has subsequently negotiated an agreement with GTW locally). The complaint challenged GTW's insistence upon local bargaining with subordinate units of UTU as inconsistent with its bargaining obligations under the RLA. The Sixth Circuit rejected UTU's arguments principally based upon its approval of the decision in *American Ry. Supervisors' Ass'n v. Soo Line R.R. ("ARSA v. Soo Line")*, 891 F.2d 675 (8th Cir. 1989), *cert. pending*, No. 89-1435 (March 13, 1990). It held that to require GTW to bargain nationally would infringe upon its rights under the RLA to designate its own representative for collective bargaining. Appendix at 4a.

The UTU seeks review of the Sixth Circuit's decision because its effect would be to undermine national agreements and to fragment collective bargaining in the railroad industry; and because it, as well as the Eighth Circuit decision it relies upon, are in conflict with the decision of the District of Columbia Circuit in *Brotherhood of Railroad Trainmen v. Atlantic Coast Line Railroad*, 383 F.2d 255 (D.C. Cir. 1967), *cert. denied*, 389 U.S. 1047 (1968) (*"Atlantic Coast Line"*). UTU recognizes the right of GTW to designate its own representative for collective bargaining, but that right would not be infringed by requiring national handling of national wage and rule issues.

REASONS FOR GRANTING THE WRIT

This case is a companion case to *ARSA v. Soo Line, supra, cert. pending* No. 89-1435 (March 13, 1990), and presents virtually identical issues affecting collective bargaining in the railroad industry, where national agreements predominate. If left undisturbed, the Sixth Circuit's decision would create uncertainty regarding existing national agreements, and impair negotiation of national agreements in the future. The Sixth Circuit's decision would also increase the likelihood of disruptions to commerce because of splintered negotiations and the fact that potential disputes involving similar issues would proliferate.

The need for the Court to grant the requested writ to address the question presented herein is apparent given the pendency of the petition for writ of certiorari in *ARSA v. Soo Line, supra*. The Sixth Circuit decision substantially adopted the Eighth Circuit's reasoning involved therein. App. at 3a-4a. In addition to the instant case and *ARSA v. Soo Line*, there are a number of pending cases concerning the national handling question at issue herein, to wit, *Railway Labor Executives' Association v. National Railroad Passenger Corporation*, D.D.C. No. 88-1816; *United Transportation Union v. Lake Terminal R.R., et al.*, N.D. Ohio, No. C 88-3414; *United Transportation Union v. Elgin, Joliet & Eastern Ry.*, N.D. Ill. No. 88-C-7708; *United Transportation Union v. Texas-Mexican Ry.*, S.D. Tex., No. L-89-7; *United Transportation Union v. Atchison, Topeka & Santa Fe Ry.*, N.D. Ill. No. 89-C-06469; *United Transportation Union v. Duluth, Missabe & Iron Range Ry.*, D. Minn. No. 5-88-178, 8th Cir. No. 90-5038MN; *United Transportation Union v. Terminal R.R. Association of St. Louis*, S.D. Ill. No. 89-3070;

United Transportation Union v. Chicago Illinois Midland Ry., C.D. Ill. No. 89-3014, 7th Cir. No. 90-2057; *United Transportation Union v. Illinois Central Ry.*, N.D. Ill., No. 88-C9607, 7th Cir. No. 90-1952; *United Transportation Union v. Houston Belt & Terminal Ry.*, et al., S.D. Tex. No. H-89-439; *United Transportation Union v. Southern Pacific Transp. Co.*, S.D. Tex. No. 90-110. The district courts in the three cases now pending in the Seventh and Eighth Circuits have adopted the reasoning of *ARSA v. Soo Line, supra*, and/or the instant case.

This Court's consideration of this matter is necessary to resolve the conflict between the District of Columbia Circuit's decision in *Atlantic Coast Line* and the Sixth and Eighth Circuit's decisions in the instant case and *ARSA v. Soo Line, supra*, respectively. Also, the Court's review is necessary to clarify the nature of the obligation of rail carriers and unions in national handling, which serves merely as the forum for negotiation of issues which are practically appropriate for national handling, but does not actually interfere with the parties' choice of representative.

Whether national handling of a particular issue is obligatory depends upon two factors: (1) "the practical appropriateness of mass bargaining" on the issue; and, (2) "the historical experience in handling any similar national movements." *Atlantic Coast Line*, 383 F.2d at 229. Under *Atlantic Coast Line*, when issues are practically suited for multi-employer bargaining and there exists a tradition of resolving such issues on a multi-employer basis, the issues must be handled on a national basis upon the insistence of either party. There is nothing in *ARSA v. Soo Line, supra*, or the decisions below to supply

any appeal to their rationale, since the National Labor Relations Act ("NLRA") precedent relied upon almost exclusively therein, is of not significant moment in this case. As this Court has observed: "[I]t should be emphasized from the outset, however, that the National Labor Relations Act cannot be imported wholesale into the railway labor arena. Even rough analogies must be drawn circumspectly, with due regard for the many differences between the statutory schemes." *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 383 (1969) (footnote omitted). *See also, Int'l Fed. of Flight Attendants v. Trans World Airlines*, ___ U.S. ___, 109 S.Ct. 1225, 1230 (1989) (caution against wholesale importation of NLRA provisions into RLA governed decisions).

Indeed, the stark difference between general labor law and the RLA, in light of the long history of national and regional handling that has shaped railroad labor relations was thoroughly discussed in *Elgin, Joliet & Eastern Ry. v. Burley*, 325 U.S. 711, 751-52 (1945) (Frankfurter, J., dissenting):

> From the point of view of industrial relations our railroads are largely a thing apart. The nature and history of the industry, the experience with unionization of the road, *the concentration of authority on both sides of the industry in negotiating collective agreements, the intimacy of relationship between the leaders of the two parties shaped by a long course of national, or at least regional, negotiations,* the intricate technical aspects of these agreements and the specialized knowledge for which their interpretation and application call, the practical interdependence of seemingly separate collective agreements – these and similar considerations admonish

against mutilating the comprehensive and complicated system governing railroad industrial relations by episodic utilization of inapposite judicial remedies.

> The Railway Labor Act of 1934 is primarily an instrument of government. As such, the view that is held of the particular world for which the Act was designed will largely guide the direction of judicial interpretation of the Act. The railroad world for which the Railway Labor Act was designed has thus been summarized by one of the most discerning students of railroad labor relations: "The railroad world is like a state within a state. Its population of some three million, if we include the families of workers, has its own customs and its own vocabulary, and lives according to rules of its own making. . . . This state within a state has enjoyed a high degree of internal peace for two generations; despite the divergent interests of its component parts, the reign of law has been firmly established." Garrison, The Railroad Adjustment Board: A Unique Administrative Agency (1937) 46 Yale L. J. 567-569. (Emphasis added).

Atlantic Coast Line relies upon an analysis of Section 2 First of the RLA (45 U.S.C. §152 First) in light of the history in the industry. *See also, First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981) (pointing out important distinctions between NLRA and RLA concerning topics of bargaining, citing *Railroad Telegraphers v. Chicago and North Western R.R.*, 362 U.S. 330 (1960)); *cf. Pittsburgh & Lake Erie R.R. v. Railway Labor Executives' Ass'n* (RLEA), S.Ct. No. 87-1589 (June 21, 1989) (*slip. op.* at 15, n. 17). The obligatory nature of national handling in the railroad

industry is not dependent upon whether national handling has commenced. That begs the question. The *Atlantic Coast Line* standards concerning *obligatory* national handling have governed for over twenty years. Fortuitous factual differences should not.

As to the Sixth Circuit's concern that forcing rail carriers into national handling amounts to interference with their choice of representatives in violation of Section 2 Third of the RLA (45 U.S.C. §152 Third), the principal ingredient of national handling is not designation of the parties' representatives, but rather national bargaining as a forum for issue resolution, rather than local bargaining by each carrier. UTU submits that this case does not actually involve interpretation or application of Section 2 Third of the RLA. GTW's rights thereunder would not be affected by an order requiring national negotiations of wages and rules.

CONCLUSION

For the foregoing reasons stated herein, Petitioner United Transportation Union respectfully asks that the writ be issued as requested herein.

Respectfully submitted,

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No. 89-1523

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED TRANSPORTATION UNION, *Plaintiff-Appellant,* v. GRAND TRUNK WESTERN RAILROAD CO., *Defendant-Appellee.*	)	ON APPEAL from the United States District Court for the Eastern District of Michigan

Decided and Filed February 21, 1990

Before: NELSON AND BOGGS, Circuit Judges, and BERTELSMAN, District Judge.*

PER CURIAM. The plaintiff in this case, the United Transportation Union, brought an action for declaratory and injunctive relief seeking to compel the defendant, Grand Trunk Western Railroad Company, to participate in national multi-employer collective bargaining as opposed to individual bargaining. The district court granted summary judgment for the defendant. *United Transp. Union v. Grand Trunk W. R.R. Co.*, 712 F.Supp. 107 (E.D. Mich. 1989) (Zatkoff, J.). We agree with the district court's

* The Honorable William O. Bertelsman, United States District Judge for the Eastern District of Kentucky, sitting by designation.

decision, which finds support in a subsequent decision by the Court of Appeals for the Eighth Circuit.

I

Defendant Grand Trunk, a small Class 1 railroad, has approximately 943 miles of track in Indiana, Illinois, Michigan, and Ohio. Its employees are represented by the plaintiff union. Although it had engaged in national multi-employer bargaining in the past, Grand Trunk decided not to do so in the round of bargaining scheduled for 1988. On April 4, 1988 – before bargaining began – Grand Trunk notified the union that "the carrier intends to conduct negotiations in connection with this notice on its own behalf. GTW is not authorizing a national conference committee to represent us in these negotiations." This lawsuit followed.

The district court held that nothing in the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.*, required the railroad to engage in national bargaining. The court observed that the cases upon which the union relied held only that a railroad could not withdraw from national bargaining once it had commenced. *United Transp. Union*, 712 F.Supp. at 111. The court also noted that an argument similar to the union's had been rejected in *American Railway and Airway Supervisors Association v. Soo Line Railroad*, 690 F.Supp. 802 (D. Minn. 1988). That decision has since been affirmed by the Court of Appeals for the Eight Circuit. *American Ry. and Airway Supervisors Ass'n v. Soo Line R.R.*, 891 F.2d 675 (8th Cir. 1989) ("*Soo Line*").

II

In the present appeal the union urges that the railroad must engage in national, multi-employer bargaining if: (1) the issues are practically suited for national bargaining; and (2) such issues have traditionally been resolved through multi-employer bargaining. The union relies on *dicta* to that effect in *Brotherhood of Railroad Trainmen v. Atlantic Coastline Railroad*, 383 F.2d 225 (D.C. Cir. 1967), *cert. denied*, 389 U.S. 1047 (1968).

We find no authority for the union's position in the Railway Labor Act. The Act does, to be sure, require the parties to "exert every reasonable effort to make and maintain agreements," 45 U.S.C. § 152, First, and requires the railroad to negotiate in good faith. *Chicago & N.W. Ry. v. United Transp. Union*, 402 U.S. 570, 574-75 (1971). But the Act expressly preserves each party's right to choose its own bargaining representative:

> "Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influences or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives." 45 U.S.C. § 152, Third.

Relying on the latter section, the Eighth Circuit's *Soo Line* opinion rejects an argument identical to that made by the union here:

> "we are aware of no decision that construes this duty to obligate the railroad to bargain for a national contract through a national bargaining representative. The unions' argument ignores the statutory right of each party to designate a

> representative with whom the other party's representative must negotiate." *Soo Line*, 891 F.2d at 677-78.

A narrow exception to the freedom of choice rule exists "where one of the negotiating parties attempts to withdraw from multi-party bargaining after negotiations have begun." *Soo Line*, 891 F.2d at 678, citing a case under the National Labor Relations Act, *Charles D. Bonanno Linen Service Inc. v. NLRB*, 454 U.S. 404, 410-11 and n.5 (1982). Here, however, the union does not deny that Grand Trunk announced its intention before bargaining began. No court of appeals has compelled national bargaining where a party opted for individual bargaining before the start of negotiations. For us to do so would be to fly in the teeth of the statute.

Accordingly, and for the reasons stated in Judge Zatkoff's opinion, 712 F.Supp. 107, the judgment of the district court is AFFIRMED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED TRANSPORTATION UNION,

Plaintiff,

vs.

GRAND TRUNK WESTERN RAILROAD COMPANY,

Defendant.
_____/

CASE NO. 88-CV-73971-DT

HONORABLE LAWRENCE P. ZATKOFF

JUDGMENT

IT IS ORDERED AND ADJUDGED that this action is hereby DISMISSED pursuant to the Memorandum Opinion and Order dated April 20, 1989.

Dated at Detroit, Michigan, this 20th day of April, 1989.

DAVID R. SHERWOOD
CLERK OF THE COURT

BY: /s/ R. P. Nartwald
DEPUTY CLERK

APPROVED:

/s/ L. P. Zatkoff
LAWRENCE P. ZATKOFF
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED TRANSPORTATION UNION,

Plaintiff,

vs.

GRAND TRUNK WESTERN RAILROAD COMPANY,

Defendant.
_____/

CASE NO. 88-CV-73971-DT

HONORABLE LAWRENCE P. ZATKOFF

MEMORANDUM OPINION AND ORDER

AT A SESSION of said Court, held in the United States Courthouse, in the City of Detroit, State of Michigan, on the 20th day of April, 1989.

PRESENT: THE HONORABLE LAWRENCE P. ZATKOFF UNITED STATES DISTRICT JUDGE

INTRODUCTION

Plaintiff, United Transportation Union (UTU), has brought this action seeking to compel the defendant, Grand Trunk Western Railroad Company (GTW), to continue to participate in national bargaining. Plaintiff seeks both declaratory and injunctive relief. Presently before the Court is defendant's Motion to dismiss or in the alternative for Summary Judgment.

I. DISMISSAL

Defendants address their motion to dismiss under Fed. R. Civ. P. 12(b)(6). A motion to dismiss for failure to

state a claim under Rule 12(b)(6) tests the legal sufficiency of the Plaintiff's Complaint. *Davey v. Tomlinson*, 627 F.Supp. 1458, 1463 (E.D. Mich. 1986); *Hudson v. Johnson*, 619 F.Supp. 1539, 1542 (E.D. Mich. 1985). "In evaluating the propriety of a dismissal under Rule 12(b)(6), the factual allegations in the complaint must be treated as true." *Janan v. Trammell*, 785 F.2d 557, 558 (6th Cir. 1986); *Windsor v. The Tennessean*, 719 F.2d 155, 158 (6th Cir. 1983), *cert. denied* ___ U.S. ___, 105 S.Ct. 105, 83 L.Ed.2d 50 (1984). Plaintiff's claims shall not be dismissed unless it is established that plaintiff cannot prove beyond doubt any set of facts to support its claim that would entitle plaintiff to relief. *Janan*, 785 F.2d at 558. In a 12(b)(6) motion the Court does not look beyond statements in the Complaint. In the case at bar, however, it is necessary for the Court to consider extraneous matters. Therefore, defendant's alternative request for relief, summary judgment, will be decided.

II. SUMMARY JUDGMENT

Summary judgment is appropriate where no genuine issue of material fact remains to be decided and the moving party is entitled to judgment as a matter of law. *Blakeman v. Mead Containers*, 779 F.2d 1146 (6th Cir. 1986); Fed. R. Civ. P. 56(c). "Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, ___, 106 S.Ct. 2548, 2552-2553 (1986). In applying this standard, the Court must view all materials

offered in support of a motion for summary judgment, as well as all pleadings, depositions, answers to interrogatories, and admissions properly on file in the light most favorable to the party opposing the motion. *Anderson v. Liberty Lobby*, 477 U.S. 242, 106 S.Ct. 2502, 2510 (1986); *United States v. Diebold*, 368 U.S. 654 (1962); *Cook v. Providence Hosp.*, 820 F.2d 176, 179 (6th Cir. 1987); *Smith v. Hudson*, 600 F.2d 60 (6th Cir. 1979), *cert. dismissed*, 4444 U.S. 986 (1979). In deciding a motion for summary judgment, the Court must consider "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at ___, 106 S.Ct. at 2512. Although summary judgment is disfavored, this motion may be granted when the trial would merely result in delay and unneeded expense. *Poller v. Columbia Broadcasting Systems, Inc.*, 368 U.S. 464, 473, 82 S.Ct. 486, 491 (1962); *A.I. Root Co. v. Computer/Dynamics, Inc.*, 806 F.2d 673, 675 (6th Cir. 1986). Where the non-moving party has failed to present evidence on an essential element of their case, they have failed to meet their burden and all other factual disputes are irrelevant and thus summary judgment is appropriate. *Celotex*, 477 U.S. at ___, 106 S.Ct. at 2553; *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. ___, 106 S.Ct. 1348, 1356 (1986) ("When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." (footnote omitted)).

III. BACKGROUND

Defendant GTW, a small Class I railroad with its headquarters in Detroit, Michigan, operates

approximately 943 miles of railroad in the states of Indiana, Illinois, Michigan and Ohio. The present GTW is the product of a merger, and includes the original GTW and the former Detroit, Toledo & Ironton Railroad (DTI) and the former Detroit, Toledo & Shoreline Railroad (DTSL). GTW is the successor to collective bargaining agreements between plaintiff, UTU and each of the merged railroads.

The plaintiff, UTU, represents GTW's employees who work in the crafts or classes of conductors, brakemen and yardmasters. The UTU has subunits, known as General Committees of Adjustment, which are headed by General Chairmen. Five different UTU General Committees have jurisdiction over GTW's UTU-represented employees. The Brakemen and Conductors Road General Committee of Adjustment has jurisdiction over brakemen and conductors who work on road crews on rail lines of the premerger GTW. A road crew typically operates trains between cities or rail yards. The Grand Trunk Yard Committee has jurisdiction over brakemen and conductors who work on yard crews on lines of the premerger GTW. The yard crew operates trains within the limits of a rail yard or switching district. The General Grievance Committee of Adjustment represents employees in road and yard service who work on lines of the former DTI. The General Committee of Adjustment has jurisdiction over road and yard brakemen and conductors who work on lines of the former DTSL. The Yardmaster's Department of the UTU represents the yardmaster's craft on the GTW, DTI and DTSL. The yardmasters, formerly an independent union, has merged into UTU.

IV. DISCUSSION

Collective bargaining agreements have no fixed termination date, but become amendable upon expiration of

a contract moratorium. At that time, both parties to the agreement become free to serve notices under Section 6 of the Railway Labor Act, 45 U.S.C. §156, and make proposed changes in the existing collective bargaining agreement. Collective bargaining can either be multi-employer bargaining, where a group of employers bargain with a union, or individual bargaining, where a single employer and a union bargain. Although railroads have historically bargained in multi-employer groups, the form of such multi-employer bargaining has changed over time. Prior to 1972 most railroads bargained in regional groups because those groups best served the practical and economic needs of railroads. More recently, a single bargaining agent has represented Class 1 railroads in multiemployer bargaining and such bargaining has been in the form of national bargaining.[1] Those railroads and unions desiring to participate in national bargaining for any round of bargaining give their power of attorney to their respective bargaining agents. For the railroads, the bargaining agent has been the National Railway Labor Conference (NRLC) through its National Carriers Conference Committee (NCCC). The NCCC is comprised of all representatives of each of the major Class 1 railroads and a single representative of small carriers, such as GTW. (See Affidavit of Emerson M. Bouchard, pages 3-4).

A. CURRENT GTW NEGOTIATIONS

GTW has in the past participated in national bargaining, which usually occurs every three or four years when railroad collective agreements are subject to renegotiation. At the beginning of prior rounds of national bargaining, GTW has given its written power of attorney to

the NCCC to act on its behalf. The most recent national collective bargaining agreements between the NCCC, on behalf of participating carriers, including GTW, and the UTU and Yardmasters were executed, respectively, October 31, 1983 and June 15, 1987, and became amendable on April 1, 1988.

In the present case GTW decided not to participate in national bargaining with other Class 1 railroads. Consequently, GTW did not give a power of attorney to the NCCC and advised Charles Hopkins, Chairman of the NRLC, of its decision not to participate in national bargaining. GTW served Section 6 notices on each UTU General Chairman on April 4, 1988, proposing changes in its collective bargaining agreements. GTW Section 6 notices, including those addressed to the UTU General Committees, advised that "the carrier intends to conduct negotiations in connection with this notice on its own behalf. GTW is not authorizing a national conference committee to represent us in these negotiations."

The General Chairman in each of the five UTU general committees acknowledged receipt of GTW's Section 6 notices and agreed to meet with GTW and discuss those notices, without prejudice to their position that national bargaining was required. A GTW labor relations representative met with all GTW unions, including the five UTU General Committees, over the matters raised by GTW's Section 6 notices. GTW met with General Chairmen Roberts and Thompson on April 19, 1988, and with General Chairmen Twyford, Criswell and Miller on April 26, 1988. GTW further met with General Chairmen Twyford and Criswell on May 24, 1988 to discuss GTW's

bargaining proposals. Subsequent to these initial meetings, General Chairmen Criswell and Twyford served GTW with Section 6 notices on July 25, 1988, proposing their own modifications in the parties agreement.

It is alleged by GTW that it reached agreement on new labor contracts on July 19, 1988 with General Chairman Thompson, who represents the Yard Crews of the premerger GTW, and General Chairman Roberts, who represents Road and Yard Crews of the former DTI. It is further alleged by GTW that these agreements were ratified by the rank-and-file members of the General Committees, and their terms have been put into effect on GTW. UTU disputes these allegations. In any event, UTU has filed suit seeking to enjoin GTW from further negotiations on a local level and to force them to participate in national handling. UTU alleges that GTW has violated the Railway Labor Act (Act), by refusing to participate in national handling of the present contract negotiations. Plaintiff argues that national handling for purposes of negotiating a new collective bargaining agreement, under the circumstances here, is obligatory under the Act.

V. LAW AND ANALYSIS

Under the Act, both carriers and their employees have a duty to "exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions." in order to avoid any interruption to commerce. 45 U.S.C. §152 First. By giving notice pursuant to 45 U.S.C. §156 ("Section 6 Notice"), either party can propose a change in their agreement. Under the Act, both carriers and employees have the right to designate their own representatives for bargaining:

> Representatives, for the purposes of this chapter shall be designated by the respective parties without interference, influence or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives.

45 U.S.C. §152, Third.

The language of the Act explicitly guarantees each party's right to select its own representative "without interference, influence or coercion." 45 U.S.C. §152 Third. Therefore, under the Act, GTW cannot be forced to designate the NRLC to negotiate on its behalf. Indeed, GTW was free to bargain on its own behalf.

Having concluded that GTW is free to bargain on its own behalf, the question left to be resolved is whether it is "obligated" to participate in national handling. In other words, is GTW obligated to bargain with a coordinated labor bargaining representative such as the Cooperating Railway Labor Organization (CRLO) as well as with the NRLC?

The leading case dealing with the issue of obligatory national handling is *Brotherhood of Railroad Trainmen v. Atlantic Coastline Railroad Company*, 383 F.2d 225, 229 (D.C. Cir. 1967), *cert. denied*, 389 U.S. 1047 (1968). In that case, the district court held that the Act authorized a group of carriers to insist upon national handling of negotiations over the issue of "crew consist." After examining the history of bargaining over that issue, the D.C. Circuit reversed, holding that national handling was not obligatory. The court explained:

> The Railway Labor Act does not universally and categorically compel a party to a dispute to accept national handling over its protest. Such bargainings is certainly lawful, however. *Whether it is also obligatory will depend on an issue-by-issue evaluation of the practical appropriateness of mass bargaining on that point* and of the historical experience in handling any similar national movements. The history and realities of crew consist bargaining in this industry impel the conclusion that mass handling was not required by the statute for bargaining on that issue. (Emphasis added)

Id. at 229.

This language, according to UTU, means that when issues are practically suited for multi-employer bargaining and there exists a tradition of resolving such issues on a multi-employer basis, the issues *must be* handled on a national basis. (Emphasis added). UTU then goes on to cite a list of cases in which various courts found that issues such as wages, health and welfare, vacation and jury duty were required to be dealt with on a national multi-employer basis. See *Chicago, Burlington & Quincy R.R. v. Railway Employees' Department*, 301 F.Supp. 603 (D.D.C. 1969); *Delaware & Hudson Ry. Co. v. United Transportation Union*, 450 F.2d 603 (D.C. Cir.), cert. denied, 403 U.S. 911 (1971); *United Transportation Union v. Burlington N. Inc.*, 325 F.Supp. 1125 (D.D.C. 1971).

A review of these cases, however, reveals that courts have found national handling to be obligatory only after the parties had commenced national bargaining and then one attempted to withdraw or take action inconsistent with the national handling. In the case at bar, GTW

notified the UTU subunits of its intention to bargain locally before national bargaining commenced.

A case similar in fact to this case was recently decided in the United States District Court in Minnesota; *American Railway and Airway Supervisors Association v. Soo Line Railroad Co.*, 690 F.Supp. 802 (D. Minn. 1988), *appeal pending*, No. 88-5350 MN (8th Cir. docketed August 23, 1988). In *Soo Line*, a rail labor organization brought action on behalf of its members seeking to compel the railroad to continue to participate in national bargaining. The railroad filed a counterclaim asserting that the unions violated that Railway Labor Act by refusing to negotiate directly with the railroad. The court held that the railroad, which notified the unions of its intention to bargain locally, before national bargaining commenced, was not required to engage in national handling of health and welfare plans. In so holding, the court stated: "no decision has been identified that required a party to engage in national bargaining under similar circumstances. The Act itself fails to recognize or address the issue of national handling in any fashion whatsoever." *Id.* at 807. The court added that the statutory silence and the lack of precedent imposing national handling under similar circumstances enforced its decision not to impose national handling. *Id.*

In the case at bar, UTU fails to cite any statutory or judicial authorities mandating that GTW participate in national bargaining. While UTU's complaint alleges GTW violated Section 2, First, of the RLA, 45 U.S.C. 152, First, by refusing to bargain with UTU on a national basis, UTU does not identify any language in Section 2, First, requiring such bargaining. UTU relied solely on an old line of cases arising in D.C. Circuit. Contrary to UTU's assertion,

none of those cases held that "a union is free to decline local negotiations and to insist that the dispute be resolved on a nationwide, multi-employer basis."

The Court finds it interesting to note that two factors cited by the Atlantic Coastline dicta, "practical appropriateness of mass bargaining" and "historical experience," have been undercut by the changing structure of the railroad industry after passage of the Staggers Rail Act of 1980, which required that railroads operate in a more competitive environment. Public Law No. 96-448, 96th Congress, 1st session, 1980. Prior to passage of the Staggers Act, railroads could collectively agree on railroad rate increases, which would go into effect if approved by the Interstate Commerce Commission (ICC). Typically, after agreeing to a national wage increase with their unions, railroads would apply to the ICC for approval to flow the cost of the wage increase through to shippers in a general rate increase. *See, e.g.*, General Increase, Bulk Carriers Conference 353 ICC 24, 29 (1978) (considering wages and health and welfare benefits costs); Increases In Freight Rates 1973, 346 ICC 305 (1973) (considering increase costs to offset retirement tax increase). The Staggers Act, however, fazed out collective rate setting and required that railroad rates be individually set by railroads. Public Law No. 96-448, Section 219, codified at U.S.C. §10706 (1980). See also, e.g., HR Rep. No. 96-1430, 96th Cong., 2nd Session, 113-14 (1980). Congress clearly contemplated that railroads would have greater individual freedom to determine their own cost structures, including labor costs. *See, e.g.*, HR Rep. No. 96-1035, 96th Cong., 2nd Session, 42-43, 119-21 (1980). Because labor costs are a significant component of costs,

requiring national bargaining would be inconsistent, not only with the Railway Labor Act, but with the goals of the Staggers Act. Accordingly, even if the D.C. Circuit's dicta could be given the meaning UTU's desires, this Court finds that national bargaining under the circumstances of this case is no longer "practically appropriate."

CONCLUSION

Accordingly, Defendant's Motion for Summary Judgment is hereby GRANTED. Plaintiff's request for injunctive relief is DENIED.

IT IS SO ORDERED.

/s/ Lawrence P. Zatkoff
LAWRENCE P. ZATKOFF
UNITED STATES DISTRICT JUDGE

FOOTNOTES

[1] The parties have not given a precise definition of "national bargaining," also referred to as "national handling." It appears that national bargaining is the practice of bargaining between the nation's railroads and their employees on a nationwide, multi-employer basis, rather than engaging in carrier by carrier local negotiations.

Statutes Relied Upon:

Railway Labor Act, 45 U.S.C. § 151, *et seq.* (Excerpts)

Section 2 First, 45 U.S.C. § 152 First

It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Section 2 Third, 45 U.S.C. § 152 Third

Representatives, for the purposes of this Act shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

Section 6, 45 U.S.C. § 156

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be

agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

No. 89-1837

In The
Supreme Court of the United States
October Term, 1989

UNITED TRANSPORTATION UNION,
Petitioner,

v.

GRAND TRUNK WESTERN RAILROAD COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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RESPONDENT GRAND TRUNK WESTERN RAILROAD COMPANY'S BRIEF IN OPPOSITION

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June 29, 1990

QUESTION PRESENTED

Whether Section 2, First of the Railway Labor Act, 45 U.S.C. § 152, First, requires a railroad to participate in national multi-employer bargaining over its protest, where the railroad gives its unions notice of its intent to bargain individually prior to the beginning of national bargaining.

LIST OF PARTIES AND RULE 29.1 LIST

The caption of this case lists all parties to the proceedings below. Respondent Grand Trunk Western Railroad Company is a wholly owned subsidiary of Grand Trunk Corporation, which is owned entirely by Canadian National Railways, a Canadian Crown corporation.

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RESPONDENT GRAND TRUNK WESTERN RAILROAD COMPANY'S BRIEF IN OPPOSITION

Respondent Grand Trunk Western Railroad Company ("GTW") respectfully requests that this Court deny the petition for writ of certiorari submitted by the United Transportation Union ("UTU") seeking review of the Sixth Circuit's decision in this case.

COUNTERSTATEMENT OF THE CASE

The Parties

GTW is a small Class 1 railroad,[1] employing approximately 3600 persons and operating 943 miles of track in Michigan, Ohio, Indiana, and Illinois. J.A. 23-24.[2] UTU represents GTW employees in the system wide crafts or classes of conductors, brakemen and yardmasters. For bargaining purposes, GTW's UTU-represented employees have been broken into five different UTU subunits, called General Committees, each of which has its own General Chairman.[3] The rates of pay, work rules, and working conditions for each craft or class are set forth in collective bargaining agreements with these UTU General Committees.

Bargaining in the Railroad Industry

Collective bargaining in the railroad industry is governed by the Railway Labor Act, 45 U.S.C. § 151 et seq. ("RLA"). Railroad collective bargaining agreements typically have no fixed

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[1]A Class 1 railroad is defined by the Interstate Commerce Commission as a railroad earning more than $50 million per year in gross revenues. 49 C.F.R. Part 1201 General Instructions 1-1(a) (1988). In 1988 there were 16 Class 1 freight railroads and approximately 484 regional, local and switching railroads. Association of American Railroads, *Railroad Facts* 2 (1988).

[2]References to "J.A." are to the Joint Appendix filed with the Court of Appeals for the Sixth Circuit in this case.

[3]In a decision issued June 18, 1990, the National Mediation Board ("NMB") cancelled the separate UTU certifications relating to conductors and brakemen from the Detroit, Toledo & Ironton Railroad and the Detroit, Toledo & Shore Line Railroad, which had previously been merged into the GTW. *Grand Trunk Western R.R. Co.*, 17 N.M.B. 282 (1990). As a result of the NMB's ruling, there are now three UTU General Committees at GTW instead of the five that previously existed.

termination date, but become amendable upon expiration of a contract moratorium that commonly lasts three or four years. At the expiration of the moratorium, the parties become free to serve written proposals for changes in the agreements, pursuant to Section 6 of the RLA, 45 U.S.C. § 156. J.A. 26.

Historically, many, but not all, railroads have elected to bargain in multi-employer groups on certain issues, such as wages. The form of such multi-employer bargaining has changed over time. Prior to 1972, most railroads bargained in regional groups. Since 1972, most Class 1 railroads have elected to participate in multi-employer bargaining on a national level. The bargaining agent for participating railroads has been the National Carrier's Conference Committee ("NCCC"),[4] which is comprised of a representative from each of the participating major Class 1 railroads and a single representative for all other carriers that elect to participate in national bargaining. J.A. 25-26, 65. For any given round of national bargaining, those railroads choosing to participate authorize NCCC, through a power of attorney, to conduct bargaining on their behalf.[5] All participating railroads

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[4]The NCCC is part of the National Railway Labor Conference ("NRLC"), membership in which is open to any railroad operating within the United States. J.A. 63.

[5]The NLRC bylaws provide that "the [NCCC] shall be provided power of attorney by member railroads desiring representation under procedures approved by the [Executive] Board." J.A. 65-66. The bylaws further provide as follows:

> No member railroad shall be deemed a party to any joint labor negotiation conducted by the National Committee unless it has specifically consented through appropriate instructions or powers of attorney. Membership in this Conference shall not prohibit or restrain a member railroad from acting individually or

(continued...)

agree to be bound by a majority vote of the representatives on the NCCC as to any position to be taken in bargaining. J.A. 66. Over the years, individual railroads have from time to time declined to participate in a multi-employer bargaining unit, choosing instead to bargain all matters locally. J.A. 28-29.

GTW's Collective Bargaining History

GTW's agreements with the UTU General Committees have historically been the product of both national and local bargaining. During past rounds of national bargaining, GTW has, at the beginning of each round, given its written power of attorney to the NCCC to act on its behalf on certain issues. J.A. 26-27. GTW last participated in national bargaining with UTU in 1985. The agreements negotiated at that time by the NCCC with UTU on behalf of GTW and other participating carriers became amendable on April 1, 1988. *Id.*

In early 1988, GTW decided not to participate in the round of national bargaining that was to begin that year. GTW was concerned that its deteriorating economic condition and unique operating characteristics no longer could be addressed through group bargaining.[6] J.A. 27. At least one other small Class 1

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[5](...continued)

> jointly with other railroads in labor relations matters, except with respect to those issues in national handling and subject to an unrevoked power of attorney.

J.A. 67.

[6]The NCCC is dominated by the large Class 1 railroads, including GTW's competitors, who have different operating characteristics and cost structures and face different competitive pressures than GTW. J.A. 28-29.

railroad also announced its intention not to participate in national bargaining.[7] J.A. 28-29.

In accordance with its decision, GTW did not give a power of attorney to the NCCC and advised its Chairman that it would not participate in national bargaining. J.A. 29-30. On April 4, 1988, prior to the beginning of any national bargaining, GTW served Section 6 notices on each UTU General Chairman proposing changes in its collective bargaining agreements with each General Committee. In its notices GTW advised each General Chairman that "the Carrier intends to conduct the negotiations in connection with this notice on its own behalf. GTW is not authorizing a national conference committee to represent us in these negotiations." J.A. 29-30, 35-39. The General Committees served their own Section 6 notices, but disputed GTW's right to "withdraw" from national bargaining. J.A. 40-44.

GTW thereafter met with the five UTU General Committees over the matters raised by the parties' Section 6 notices. J.A. 30. On July 19, 1988 GTW reached agreement on new labor contracts with two UTU General Committees. J.A. 31. These agreements, which cover approximately 75 percent of GTW's UTU-represented employees, were ratified by the rank-and-file members of those General Committees, and have been put into effect. *Id.* GTW reached agreement with one more General Committee in early 1990, bringing to 97 percent the number of UTU-represented employees covered by agreements.

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[7]The Soo Line Railroad also decided not to participate in the current round of national bargaining. *See American Railway & Airway Supervisors Ass'n v. Soo Line R.R.*, 891 F.2d 675 (8th Cir. 1989), *pet. for cert. pending*, No. 89-1435 (filed March 13, 1990). In addition, in recent years Conrail and Amtrak, both of which are Class 1 railroads, have bargained individually, as have many of the new regional railroads created from spinoffs by some of the Class 1 railroads. J.A. 28-29.

Proceedings Below

UTU brought this action on behalf of the three General Committees which refused to acknowledge GTW's right to bargain individually. In its complaint, UTU alleged that GTW's refusal to participate in national bargaining violated GTW's duty to make and maintain agreements as set forth in Section 2, First of the Railway Labor Act, 45 U.S.C. § 152, First. J.A. 4-6. The district court granted summary judgment to GTW. *United Transp. Union v. Grand Trunk Western R.R.*, 712 F. Supp. 107 (E.D. Mich. 1989). J.A. 7-19. The Court of Appeals for the Sixth Circuit affirmed, upholding the district court's ruling that nothing in the RLA required a railroad to engage in national bargaining, and that such a requirement would violate the railroad's right under Section 2, Third, 45 U.S.C. § 152, Third, to choose its own bargaining representative. 133 L.R.R.M. (BNA) 2845 (6th Cir. 1990). The Sixth Circuit followed a similar ruling by the Court of Appeals for the Eighth Circuit in *American Railway & Airway Supervisors Ass'n v. Soo Line R.R.*, 891 F.2d 675 (8th Cir. 1989), *pet. for cert. pending*, No. 89-1435 (filed March 13, 1990).[8]

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[8]Although UTU identifies the Eighth Circuit's decision as a "companion" case to this one, the parties are different and the issues are not identical. In *Soo Line*, the railroad sought to bargain individually only as to a single issue -- health and welfare benefits -- and remained willing to participate in national bargaining as to all remaining issues. In contrast, GTW indicated its intent to bargain individually as to all issues.

REASONS WHY THE PETITION SHOULD BE DENIED

The Sixth Circuit's ruling that the RLA does not require GTW to participate in national bargaining does not warrant review by this Court. The right of a carrier (or union) to choose not to participate in future rounds of national bargaining is fully consistent with its duty to bargain in good faith under Section 2, First of the RLA. The history of collective bargaining in the railroad industry contains numerous instances of individual bargaining, refuting any claim that participation in national bargaining has ever been understood to be a requirement of the Act. The court below correctly recognized that GTW's *voluntary* participation in prior rounds of national bargaining did not mean that it could be forever forced to participate in future national bargaining against its will, and that such a requirement would deprive GTW of its right to select its own collective bargaining representative in direct violation of Section 2, Third of the Act, 45 U.S.C. § 152 Third. The Sixth Circuit's ruling is also consistent with precedent under the National Labor Relations Act, 29 U.S.C. § 151 et seq. ("NLRA"), which has recognized the right of an employer to withdraw from a multi-employer bargaining unit prior to the commencement of group bargaining. This Court upheld that principle in *Charles D. Bonanno Linen Serv., Inc. v. NLRB*, 454 U.S. 404 (1982). Consideration of the same factors that support the NLRA precedent has led every court to consider the issue since *Bonanno* to conclude that national bargaining is not mandatory under the RLA where a railroad announces its intention to bargain individually before national bargaining commences,[9] thus belying any need for

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[9]*See United Transp. Union v. Chicago & Illinois Midland Ry.*, 731 F. Supp. 1336 (C.D. Ill. 1990), *appeal docketed*, No. 90-2057 (7th Cir.); *United Transp. Union v. Illinois Central Ry.*, 731 F. Supp. 1332 (N.D. Ill. 1990), *appeal docketed*, No.

(continued...)

"clarification" of railroads' obligations in these circumstances. UTU's predictions of dire consequences for the collective bargaining process in the railroad industry if the Sixth Circuit's decision is allowed to stand are unfounded and are in fact belied by the industry's long history of satisfactory labor relations even though national bargaining has never been universal.

Nor can review be predicated on the asserted conflict between the Sixth Circuit's decision and that of the Court of Appeals for the District of Columbia Circuit in *Brotherhood of R.R. Trainmen v. Atlantic Coast Line R.R.*, 383 F.2d 225 (D.C. Cir. 1967), *cert. denied*, 389 U.S. 1047 (1968). In that case, which was decided twenty-three years ago and did not have the benefit of this Court's *Bonanno* decision, the D.C. Circuit held that a union could not be forced to participate in national bargaining over an issue that had historically been bargained locally, stating that "[t]he Railway Labor Act does not universally and categorically compel a party to a dispute to accept national handling over its protest." 383 F.2d at 229. The court's further statement--on which UTU places so much emphasis--that national handling might be obligatory depending on an evaluation of the "appropriateness" of mass bargaining on the issue and the "historical experience" in handling the issue is thus *dicta*, and was unsupported by any discussion of the requirements of the RLA. Moreover, it is far from clear that UTU is correct in its assumption that application of the D.C Circuit's *dicta* in the present context will result in a conflict with the Sixth Circuit. The Staggers Rail Act of 1980 changed the competitive climate in the railroad industry in such a way that even the D.C. Circuit might find that national bargaining is no longer "appropriate" and the "historical experience" no longer relevant in the

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[9](...continued)
90-1952 (7th Cir.); *United Transp. Union v. Duluth, Missabe & Iron Range Ry.*, No. 5-88-0178 (D. Minn. decided Dec. 21, 1989), *appeal docketed*, No. 90-5038 MN (8th Cir.).

circumstances that now exist. In short, the *Atlantic Coast Line* decision at best presents only a hypothetical conflict with the Sixth Circuit's decision, and thus does not raise an issue that merits this Court's attention.

I. The Sixth Circuit's Refusal To Require GTW To Participate In National Bargaining Does Not Present A Significant Issue Under The Railway Labor Act

Stated simply, UTU claims in its petition that review by this Court is warranted because over time national bargaining has become so critical to successful labor relations in the railroad industry that the Sixth Circuit's decision poses a serious threat to the industry's continued stability. Pet. at 4. Whatever merit such a claim might have in a legislative context, it falls far short of suggesting that review of the Sixth Circuit's decision by this Court is necessary. The ruling below is fully consistent with the Act, with analogous rulings under the NLRA, and with industry practice. The mere fact that rail unions will now have to bargain with GTW and perhaps other carriers on an individual basis, and that some of the advantages that the unions perceive in national bargaining might be lost as a result, does not create the sort of threat to the industry's "stability" that courts may remedy.

A. The Ruling Below Is Fully Consistent With The RLA

UTU's position seems to be that once a railroad has agreed to participate in national bargaining, its duty to "make and maintain agreements" under Section 2, First of the RLA requires that it continue to do so in the future against its will. Section 2, First, however, simply does not provide either literal or theoretical support for the result that UTU seeks. Section 2, First provides that:

> It shall be the duty of all carriers, their officers, agents, and employees to exert every

> reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes . . . in order to avoid any interruption to commerce or to the operation of any carrier . . . .

Although this Court has described the duty imposed by Section 2, First as the "heart" of the RLA, *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 377-78 (1969), there are well-established limits on that section's scope. In *Chicago & N.W. Ry. v. United Transp. Union*, 402 U.S. 570 (1971), this Court held that Section 2, First imposes a duty on railroads and unions to bargain in good faith. However, nothing in Section 2, First specifies how that bargaining is to occur.[10] Thus, this Court has cautioned that "great circumspection should be used in [extending judicial enforcement of Section 2, First] beyond cases involving 'desire not to reach an agreement,' for doing so risks infringement of the strong federal labor policy against governmental interference with the substantive terms of collective-bargaining agreements." 402 U.S. at 579 n.11.[11] Similarly, although Section 6 of the Act, 45 U.S.C. § 156, sets forth certain procedures that are to be followed before either party to an agreement can implement changes in rates of pay, rules, or working conditions, nothing in those procedures requires or even mentions multi-employer bargaining. Thus, Congress left the

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[10]*See Brotherhood of Locomotive Engineers v. Baltimore & Ohio R.R.*, 310 F.2d 503, 511 (7th Cir. 1962), *aff'd per curiam*, 372 U.S. 284 (1963) ("While in this case both parties recognize that collective bargaining between the Organizations and the Carriers is required by the Railway Labor Act, . . . we know of no requirement as to precise form or method of such bargaining.").

[11]The Court had earlier noted that "[t]he strictest compliance with the formal procedures of the Act is meaningless if one party goes through the motions with a 'desire not to reach an agreement,'" 402 U.S. at 578, *citing NLRB v. Reed & Prince Mfg. Co.*, 205 F.2d 131, 134 (lst Cir. 1953).

manner of bargaining entirely to the parties to each dispute, and the statute's silence as to the form such bargaining should take precludes any contention that the RLA mandates one form of bargaining over another.[12]

There is nothing inherently inconsistent with a railroad's decision not to participate in future rounds of national bargaining and its duty under Section 2, First to bargain in good faith. As issues and economic realities change, the circumstances that caused a party to decide to fulfill its bargaining obligation through a multi-employer group may no longer exist. A timely[13] decision not to participate further in a multi-employer group as a result of a good faith determination that the group decisionmaking process no longer serves that party's interests in no way implies the "desire not to reach agreement" proscribed by Section 2, First. Indeed, at the time UTU filed this lawsuit GTW had already reached agreements with two of the five General Committees representing its employees, and it has since

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[12]*Cf. Burlington Northern R.R. v. Brotherhood of Maintenance of Way Employees*, 107 S.Ct. 1841, 1850-51 (1987) (Section 2, First could not be the basis for regulating secondary picketing under the RLA, because the RLA was silent on the subject and "Congress has provided 'neither usable standards nor access to administrative expertise . . . .'").

[13]The timing of GTW's notice of its intention to bargain individually is not merely a "fortuitous" factual circumstance that has no relevance to GTW's obligations under the Act, as UTU suggests. Pet. at 8. Precedent under the NLRA has long distinguished between attempts to withdraw from multi-employer bargaining after such bargaining has commenced, which is considered to violate the duty to bargain in good faith, and withdrawal prior to the commencement of such bargaining, which is not considered to violate that duty. *See Retail Assoc., Inc.*, 120 N.L.R.B. 388 (1958).

reached agreement with a third, thus refuting any suggestion that a "desire not to reach agreement" was present in this case.[14]

On the other hand, as the Sixth Circuit correctly found, to require GTW, against its will, to participate in future rounds of national bargaining would contravene the express guarantee of Section 2, Third of the RLA. That section provides:

> Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives.

The legislative history of the RLA confirms that Congress intended Section 2, Third to guarantee both carriers and unions freedom to choose who would represent them at the bargaining table.[15] In multi-employer bargaining, individual carriers agree to negotiate through a group representative, whose bargaining positions and strategies are directed by the group as a whole. J.A. 65-66. *See Delaware & Hudson Ry. v. United Transp. Union*, 450 F.2d 603, 613 n.21 (D.C. Cir.), *cert. denied*, 403 U.S. 911 (1971) ("the NRLC is bound to act in accordance with the

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[14]GTW has also reached a new agreement with the Brotherhood of Locomotive Engineers, and contract discussions with three other unions are now in mediation before the NMB.

[15]*See Texas & New Orleans R.R. v. Brotherhood of Railway & S.S. Clerks*, 281 U.S. 548, 569 (1930); *Hearings on H.R. 9861 Before the House Comm. on Rules*, 73d Cong., 2d Sess. 11 (1934), *reprinted in* M. Campbell & E. Brewer, 3 *The Railway Labor Act of 1926: A Legislative History* (1988) *("RLA History")* (J.A. 48-50); *Hearings on S. 3266 Before the Senate Comm. on Interstate Commerce*, 73d Cong., 2d Sess. 11 (1934), *reprinted in RLA History* (J.A. 51-55).

desires of the majority of the members of the multi-employer bargaining unit."). Because small railroads like the GTW have a very diluted vote on the NCCC, they effectively have no influence in deciding the NCCC's position. Participation in national bargaining thus necessarily entails the relinquishment of a small railroad's statutory right to choose its own representative. To the extent the decision to participate is voluntary, no violation of Section 2, Third exists. However, the critical element of voluntariness would be removed under a ruling that binds a party to future rounds of bargaining by virtue of its participation in the past. Certainly here, where the evidence is undisputed that the railroads gave new powers of attorney to NCCC for each round of bargaining in which they chose to participate,[16] there is no suggestion that the railroads understood that they were binding themselves to national bargaining for all time.[17]

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[16]*See* n.5. *supra*.

[17]The National Mediation Board has repeatedly characterized national bargaining as voluntary. For example, in its Sixth Annual Report to Congress in 1940, the NMB explained:

> Occasionally, when a national or regional movement for wage adjustments develops on the part of the carriers or organizations of their employees, the question arises as to whether the resultant disputes should be mediated individually or as a single case through relatively small conference committees representing all of the carriers on the one hand, and all of the employee organizations on the other. . . . However, as advantageous as is the handling of such disputes on a national or regional basis, *the Board definitely ruled during the past year that it was not authorized under the act to require such handling on the part of either the carriers or their employees. This method can be effected only by the agreement or consent of the parties involved.*

(continued...)

UTU's suggestion that national bargaining affects only the "forum for issue resolution" and not GTW's right to designate its own representative, Pet. at 8, thus does not reflect what the Sixth Circuit correctly recognized was the principal consequence of involuntary participation in the group, *i.e.*, loss of GTW's statutory right to choose its own bargaining representative. In light of the RLA's silence as to the form that bargaining must take, national bargaining cannot have so exalted a status as to justify a rule that subordinates all other statutory interests to its preservation. The mandate of Section 2, Third of the RLA simply does not permit a ruling that would require a carrier to participate in national bargaining over its objection.

B. The Ruling Below Is Fully Consistent With Existing Precedent Under The NLRA

The Sixth Circuit's decision accords fully with precedent under the NLRA, which has long recognized the right of employers to withdraw in a timely fashion from multi-employer bargaining. As this Court has explained:

> Until 1958, the [National Labor Relations Board] permitted both employers and the union to abandon the unit even in the midst of bargaining. . . . But in *Retail Associates, Inc.*, 120 N.L.R.B. 388 (1958), the Board announced guidelines for withdrawal from multiemployer units. These rules, which reflect an increasing emphasis on the stability of multiemployer units, permit any party to

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[17](...continued)
National Mediation Board, *Sixth Annual Report* 4-5 (1940)(emphasis added). *See also* National Mediation Board, *Twenty-First Annual Report* 14 (1955); National Mediation Board, *Thirty-Second Annual Report* 9 (1966).

> withdraw prior to the date set for negotiation of a new contract or the date on which negotiations actually begin, provided that adequate notice is given. Once negotiations for a new contract have commenced, however, withdrawal is permitted only if there is "mutual consent" or "unusual circumstances" exist. *Id.*, at 395.

Charles D. Bonanno Linen Serv., Inc. v. NLRB, 454 U.S. 404, 410-11 (1982). In *Bonanno*, this Court upheld an NLRB ruling that an impasse in multi-employer bargaining is not an "unusual circumstance" that will justify mid-bargaining withdrawal. *Id.* at 412. Underlying the long line of decisions on this issue has been the fundamental principle that an employer's decision to participate in multi-employer bargaining is purely voluntary. "The Board has recognized the voluntary nature of multiemployer bargaining. It neither forces employers into multiemployer units nor erects barriers to withdrawal prior to bargaining." 454 U.S. at 412.[18]

Although the UTU argues that NLRA precedent "is of not significant moment in this case," Pet. at 6, this Court has found analogies between the RLA and the NLRA appropriate when the two Acts' policies are similar. *See, e.g., Trans World Airlines, Inc. v. Independent Fed'n of Flight Attendants,* 489 U.S. 426, 109 S. Ct. 1225, 1233 (1989); *Brotherhood of R.R. Trainmen v.*

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[18]Under the NLRA, the test for determining whether an employer is bound to group bargaining is whether the employer has indicated from the outset an unequivocal intention to be bound by group action and collective bargaining. *See, e.g., Carpenter's Local Union No. 345 Health & Welfare Fund v. W.D. George Constr. Co.,* 792 F.2d 64, 69 (6th Cir. 1986). An employer may withdraw from the group upon "evidence of an intent to pursue an individual course of action with respect to labor relations." *Trustees of UIU Health & Welfare Fund v. New York Flame Proofing Co.,* 828 F.2d 79, 83 (2nd Cir. 1987); *Ruan Transport Corp.,* 234 N.L.R.B. 241, 242 (1978).

Jacksonville Terminal Co., 394 U.S. at 383. The policies implicated by forced participation in national bargaining are identical under both Acts. Both Section 2, First of the RLA and Section 8(d) of the NLRA, 29 U.S.C. § 158(d), impose the same duty to bargain in good faith. *Chicago & N.W. Ry. v. United Transp. Union*, 402 U.S. at 578-79 (citing NLRA cases).

Similarly, both Section 2, Third of the RLA and Section 8(b)(1) of the NLRA, 29 U.S.C. § 158(b)(1)(B), prohibit interference in the selection of the other party's bargaining representative. Indeed, this Court has recognized that Section 8(b)(1)(B) of the NLRA was patterned after Section 2, Third of the RLA.[19] The same policy of non-interference underlies both NLRA Section 8 and RLA Section 2, Third. *NLRB v. Pennsylvania Greyhound Lines, Inc.*, 303 U.S. 261, 266 (1938). In *Florida P. & L. Co. v. International Bhd. of Electrical Workers*, 417 U.S. 790, 799 (1974), this Court observed that the legislative history of Section 8(b)(1)(B) revealed "[t]he specific concern of Congress was to prevent unions from trying to force employers into or out of multi-employer bargaining units." *Id.* at 803.[20] The similarities between the two Acts are counterbalanced by no

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[19]Section 8(b)(1)(B) provides that unions may not "restrain or coerce . . . an employer in the selection of his representatives for the purposes of collective bargaining . . . ." 29 U.S.C § 158(b)(1)(B).

[20]*See also General Teamsters Local Union No. 174 v. NLRB*, 723 F.2d 966, 971 (D.C. Cir. 1983) ("right of employees and of employers to choose their own representatives in formal labor negotiations . . . is 'fundamental to the statutory scheme.'"); *General Electric Co. v. NLRB*, 412 F.2d 512, 516 (2nd Cir. 1969) ("either side can choose [representatives] as it sees fit and neither can control the other's selection . . . .").

significant differences that would justify a different result under the RLA.[21]

C. The Ruling Below Will Not Disrupt Collective Bargaining In The Railroad Industry

UTU's assertions that the Sixth Circuit's ruling will undermine existing national agreements and lead to labor disputes are exaggerated at best, and irrelevant in any event. As noted above, national bargaining never has been universal,[22] and the ability of some railroads to bargain individually has not historically resulted in disruptions in service or destruction of the

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[21]National bargaining in the railroad industry finds striking parallels in several NLRA industries. For example, as in the rail industry, multi-employer collective bargaining in the trucking industry evolved first on a regional basis in the 1950's. In 1964, trucking companies agreed to bargain on a national basis for a National Master Freight Agreement covering wages and fringe benefits. The national agreement was supplemented by local agreements. Industrial Relations Research Association, *Collective Bargaining: Contemporary American Experience* 106-07 (1980). Like the railroad industry, the trucking industry was regulated pursuant to the Interstate Commerce Act. Congress essentially deregulated the trucking industry in 1980, with enactment of the Motor Carrier Act of 1980, Pub. L. No. 96-296, 96th Cong. 2d Sess. (1980). As a result of deregulation, and the competition it brought, the long-standing centralized bargaining in the trucking industry has begun to break-up, with many trucking companies now bargaining on an individual basis. *See, e.g.*, T. Kochan, H. Katz & R. McKersie, *The Transformation of American Industrial Relations* 128-30 (1989). Similarly, competitive pressures in the steel industry, brought about in part by foreign competition, caused the break-up of the steel industry's 30-year tradition of national bargaining. *Id. See also* J. Hoerr, *And the Wolf Finally Came: The Decline of the American Steel Industry* 474-76 (1988); B. Fischer, *Impact of Transition on Steel's Labor Relations*, 1986 Lab. L. J. 569. *See generally* R. Hoffman, *The Trend Away From Multi-Employer Bargaining*, 1983 Lab. L. J. 80.

[22]The National Mediation Board has noted on numerous occasions that not all railroads have participated in national bargaining. *See, e.g.*, National Mediation Board, *Forty-Sixth Annual Report* 4-5 (1980); National Mediation Board, *Forty-Seventh Annual Report* 5 (1981); National Mediation Board, *Fiftieth Annual Report* 5 (1984).

collective bargaining process for the rest of the industry. As GTW's success in obtaining agreements with two (and later three) of its UTU General Committees demonstrates, individual bargaining does not inevitably lead to strikes. The loss of whatever efficiencies national bargaining might be thought to provide as carriers, in response to economic and competitive pressures, elect not to participate in future rounds of national bargaining, does not represent the sort of disruption of the bargaining process that warrants scrutiny by this Court. On the other hand, voluntary participation in national bargaining would be discouraged if such participation meant that the right to bargain individually would be forever lost. The Sixth Circuit's ruling thus in no way disserves the statutory interest in the peaceful resolution of labor disputes.

II. The Sixth Circuit's Decision Does Not Conflict With D.C. Circuit Precedent

UTU's contention that the ruling below conflicts with the D.C. Circuit's *Atlantic Coast Line* decision is without merit. In *Atlantic Coast Line*, a group of carriers sought to require a union to bargain with them nationally over an issue that had previously been bargained primarily at the local level. The D.C. Circuit, like the Sixth Circuit here, held that the union could not be compelled to bargain nationally over its objection.[23] 383 F.2d

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[23]In an *amicus* brief filed with the D.C. Circuit, the United States urged the court to rule that national bargaining could not be compelled:

> [T]he ruling below eliminates the freedom of the parties to choose to engage in local bargaining, a freedom which until now has been regarded as a basic tenet of collective bargaining. In the railroad industry, as well as in industries under the NLRA, it has been -- and should be -- the rule that multi-employer bargaining is based upon consent of both parties.

(continued...)

at 228. The court explained that "the Railway Labor Act does not universally and categorically compel a party to a dispute to accept national bargaining over its protest." *Id.* at 229. Noting that national bargaining was "certainly lawful," the D.C. Circuit went on to state that "whether [national bargaining] is also obligatory will depend on an issue-by-issue evaluation of the practical appropriateness of mass bargaining on that point and of the historical experience in handling any similar national movements." *Id.* The court concluded that the "history and realities" of industry bargaining on the issue in dispute established that national bargaining on that issue was not required.[24] *Id.*

UTU's attempt to create a conflict between the D.C. Circuit's decision and that of the Sixth Circuit below fails for several reasons. First, the statement on which UTU relies is classic *dicta*. Given that "no holding can be broader than the facts before the court," *United States v. Stanley*, 483 U.S. 669, 680 (1987), the D.C. Circuit's statements regarding a possible obligation to bargain nationally did not constitute its holding in the case. Having determined as a matter of fact that the issue

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[23](...continued)

Brief of United States as *Amicus Curiae* at 11, *Brotherhood of Railroad Trainmen v. Atlantic Coast Line R.R.*, 383 F.2d 225 (D.C. Cir. 1967), *cert. denied*, 389 U.S. 1047 (1968).

[24]The D.C. Circuit's attempt to draw a distinction between "local" and "national" issues based on historical experience in the industry is patently unsound. To find that the large number of railroads that elect not to participate or have never participated in national bargaining can be required to do so simply because other railroads once chose to bargain as a group has no support in the Act, and the type of inquiry required, besides being ill-suited to judicial determination, "risks infringement of the strong federal labor policy against governmental interference with the substantive terms of collective bargaining agreements." *Chicago & N.W. Ry. v. United Transp. Union*, 402 U.S. at 579 n.11.

in dispute had previously been bargained locally, and as a matter of law that national bargaining of a "local" issue could not be required over a party's protest, the D.C. Circuit had no need to decide whether national bargaining could ever be required based solely on that party's previous participation in such bargaining.[25] Second, the absence of any discussion by the D.C. Circuit of Section 2, First or Section 2, Third makes clear that the arguments decided by the Sixth Circuit were not addressed in the earlier case, further diminishing any possible weight that the court's statement might have. Despite the fact that many railroads have bargained locally both before and after the *Atlantic Coast Line* decision, no court, including the D.C. Circuit, has ever held that a railroad may be forced to participate in national bargaining over any issue where the railroad, prior to the commencement of national bargaining, has advised the union of its intent not to participate.[26]

Finally, UTU's assumption that application of the D.C. Circuit's twenty-three year old *dicta* today would result in a conflict with the Sixth Circuit's decision is not at all self-evident. As already noted, the "history" of bargaining in the rail industry

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[25]It cannot be assumed that the D.C. Circuit would apply the same criteria to determine a railroad's obligation to bargain nationally as it applied to determine the union's obligation. At the time of the *Atlantic Coast Line* ruling, courts read the NLRA to impose different requirements on unions than on employers insofar as multi-employer bargaining was concerned. *See, e.g., Publishers' Ass'n of New York City v. NLRB*, 364 F.2d 293 (2nd Cir.), *cert. denied*, 385 U.S. 971 (1966).

[26]The only courts that have required parties to participate in national handling against their will have done so because the parties did not seek to bargain individually until after national bargaining was underway. *See, e.g., Chicago, Burlington & Quincy R.R. v. Railway Employees' Dep't*, 301 F. Supp. 603 (D.D.C. 1969). This result is entirely consistent with authority under the NLRA. *See* n.13, *supra; Charles D. Bonanno Linen Service, Inc. v. NLRB*, 454 U.S. at 410-11.

is replete with instances of individual bargaining. Moreover, in the Staggers Rail Act of 1980, Pub. L. No. 96-448, 96th Cong., 2nd Sess. (1980), Congress substantially deregulated the railroad industry with the clear intention that railroads operate in a more competitive manner.[27] *See, e.g., Coal Exporters Ass'n v. United States,* 745 F.2d 76, 80-81 (D.C. Cir. 1984), *cert. denied,* 471 U.S. 1072 (1985). Congress clearly has intended that railroads have greater individual freedom to determine their own cost structures, including labor costs. *See, e.g.*, H.R. Rep. No. 96-1035, 96th Cong., 2d Sess. 42-43, 119-21 (1980). *See also American Short Line R.R. Ass'n v. United States,* 751 F.2d 107, 109-110 (2nd Cir. 1984). The requirement that railroads be compelled against their will to bargain issues such as wages in national bargaining is flatly inconsistent with Congress' intention, as clearly expressed in the Staggers Act, that railroads price their services competitively. Requiring railroads to bargain wages and other significant labor cost items on a national basis would effectively remove such topics from competition. A railroad wishing to adjust its cost structure to be able to price its services to meet competition in its own particular market will not be able to do so if a significant element of its costs must be set on a uniform national basis. The changes brought about by the Staggers Act surely have a role in a court's evaluation of the "practical appropriateness" of national bargaining, and the recency of that legislation certainly reduces any significance that the industry's "historical experience" might otherwise have. *See*

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[27]For example, prior to passage of the Staggers Act, railroads could collectively agree on railroad rate increases, which would go into effect if approved by the Interstate Commerce Commission. Railroads could lawfully fix prices on a collective basis through membership in rate bureaus. *See, e.g., American Short Line R.R. Ass'n v. United States*, 751 F.2d 107, 109 (2nd Cir. 1984). The railroads would then pass through any collectively-bargained labor cost increases to shippers. *See, e.g., Increased Freight Rates and Charges, 1974, Nationwide*, 349 I.C.C. 862, 865 (1975) (approving 4% rate increase in part based on railroad's agreement to 4% wage increase).

United Transp. Union v. Grand Trunk Western R.R., 712 F. Supp. at 112 ("Because labor costs are a significant component of [a railroad's] costs, requiring national bargaining would be inconsistent, not only with the Railway Labor Act, but with the goals of the Staggers Act. Accordingly, even if the D.C. Circuit's dicta could be given the meaning UTU's [sic] desires, this Court finds that national bargaining under the circumstances of this case is no longer 'practically appropriate.'"). J.A. 16-17. Consequently, the D.C. Circuit might well decide that the gloss it put on Section 2, First, in *Atlantic Coast Line* is no longer valid. *See United States v. Fausto,* 484 U.S. 439, 453 (1988) ("This classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination, necessarily assumes that the implication of a statute may be altered by the implications of a later statute.").

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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